

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

NEW CENTURY MORTGAGE CORP.,

Plaintiff,

v.

GREAT NORTHERN INSURANCE
COMPANY, FEDERAL INSURANCE
COMPANY,

Defendants.

)

) CASE NO. 05C2370

)

) Judge Coar

)

) **DECLARATION OF MONIKA**

) **McCARTHY IN SUPPORT OF**

) **PLAINTIFF'S MOTION FOR**

) **SUMMARY JUDGMENT**

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)

)

DECLARATION OF MONIKA L. McCARTHY

I, MONIKA L. McCARTHY, declare as follows:

1. I am Senior Vice President and General Counsel for New Century Mortgage Corporation (“NCMC”). I am personally familiar with the facts set forth herein - except those matters I have attested to on information and belief - and if called upon to testify could and would do so competently.

2. In my role as General Counsel, I supervise and manage litigation involving NCMC through retention and use of outside counsel and our in house legal department.

3. I am familiar with the insurance coverage obtained for NCMC and all other related entities.

4. In 2003, I was responsible for providing notice of lawsuits to insurance companies that insured NCMC.

5. On April 5, 2002, Paul Bernstein filed a civil class action in the Circuit Court of Cook County, Illinois County Department, Chancery Division against NCMC entitled *Paul Bernstein v. New Century Mortgage Corporation*, Civil Action No. 02CH 06907 (the “*Bernstein Action*”). A true and correct copy of the April 5, 2002 Complaint in the *Bernstein Action* is attached to the concurrently filed Appendix of Exhibits (“AOE”) as **Exhibit “A.”**

6. Bernstein sought damages resulting from his receipt of an unsolicited fax on February 26, 2002 allegedly in violation of the Telephone Consumer Protection Act (“TCPA”). NCMC believed that the facsimile transmissions were welcome or authorized under applicable law, including the TCPA.

7. On or about September 30, 2003, Bernstein filed a Second Amended Complaint. A true and correct copy of the September 30, 2003 Second Amended Complaint in the *Bernstein Action* is attached to the AOE as **Exhibit “B.”**

8. NCMC had contracted with Fax.com to transmit faxes. A true and correct copy of NCMC’s contract with Fax.com is attached to the AOE as **Exhibit “C.”**

9. Based on information and belief, NCMC had no way to disprove Fax.com sent the faxes since Fax.com had filed for bankruptcy and had gone out of business and kept no records or logs of the faxes it sent on behalf of its clients, including NCMC.

10. Based on information and belief, NCMC had reason to believe that Fax.com filed for bankruptcy and went out of business, in part, because of numerous lawsuits alleging it was sending unsolicited faxes on behalf of its customers, despite Fax.com's representations to the contrary. NCMC was told by Fax.com that it would only send faxes to welcomed recipients.

11. Great Northern Insurance Company issued Commercial General Liability policy no. 3539-77-36LAO to New Century Financial Corporation ("NCFC") effective February 3, 2002 through February 3, 2003, naming NCMC as an insured by way of endorsement. A true and correct copy of policy no. 3539-77-36LAO is attached to the AOE as **Exhibit "D."**

12. Federal Insurance Company issued Commercial Umbrella Policy No. 7977-01-85 to NCFC effective February 3, 2002 through February 3, 2003, naming NCMC as an insured by way of endorsement. A true and correct copy of policy no. 7977-01085 is attached to the AOE as **Exhibit "E."**

13. On August 15, 2003, NCMC sent notice of the *Bernstein* Action to Chubb through financial Guarantee Insurance Brokers. A true and correct copy of the August 15, 2003 notice letter from NCMC to Chubb is attached to the AOE as **Exhibit "F."**

14. Chubb acknowledged receipt of the notice and agreed to defend NCMC subject to a reservation of rights. A true and correct copy of the January 7, 2004 letter is attached to the AOE as **Exhibit "G."**

15. On March 25, 2004, NCMC sent a letter to Chubb enclosing a spreadsheet of NCMC's attorney's fees and costs in the *Bernstein* Action and requesting payment of those fees and costs. A true and correct copy of the March 25, 2004 letter is attached to the AOE as **Exhibit "H."**

16. NCMC had spent in excess of \$89,000 from date of tender through January 2004.

17. On April 9, 2004, Chubb sent a letter to NCMC agreeing to reimburse New

Century's reasonable and necessary defense costs from August 27, 2003. A true and correct copy of Chubb's April 9, 2004 letter is attached to the AOE as **Exhibit "I."**

18. During May 2004, discussions ensued between NCMC and Chubb regarding attendance at a mediation.

19. On June 14, 2004, NCMC received a settlement demand from Bernstein in the amount of \$6 million. A true and correct copy of the June 14, 2004 settlement demand from Bernstein is attached to the AOE as **Exhibit "J."**

20. On June 17, 2004 NCMC sent a letter to Chubb enclosing Bernstein's \$6 million demand and requesting that Chubb fund the settlement. A true and correct copy of NCMC's June 17, 2004 letter to Chubb is attached to the AOE as **Exhibit "K."**

21. NCMC's counsel also advised Chubb that Bernstein was seeking class certification by way of motion, with a hearing scheduled in early August 2004. A true and correct copy of NCMC's June 17, 2004 letter to Chubb is attached to the AOE as **Exhibit "K."**

22. On June 22, 2004, Chubb sent a letter to NCMC advising of their intent to continue to defend NCMC but refusing to indemnify, and refusing to participate in the mediation anticipated to take place on June 23, 2004. A true and correct copy of Chubb's June 22, 2004 letter is attached to the AOE as **Exhibit "L."**

23. On August 5 and 6, 2004, NCMC and Bernstein participated in mediation in an attempt to resolve the claims made by Bernstein.

24. On August 10, 2004, Bernstein and NCMC reached an agreement to settle the *Bernstein* Action for \$1.95 million.

25. The parties negotiated and entered into a Settlement Agreement, pursuant to whose terms New Century agreed to pay plaintiff's \$1.95 million to settle the *Bernstein* Action, which amounted to \$500 per class claimant. A true and correct copy of the Settlement Agreement is attached to the AOE as **Exhibit "Q."**

26. As NCMC's Senior Vice President and General Counsel I believed the settlement of \$1.95 million was eminently reasonable and prudent, especially as NCMC's potential liability

exposure, if the case had proceeded to trial following class certification, was calculated at \$300 - \$900 million.

27. On August 16, 2004, a Third Amended Complaint was filed in the *Bernstein* Action to reflect the claims being settled by NCMC and Bernstein. A true and correct copy of the Third Amended Complaint is attached to the AOE as **Exhibit "R."**

28. On September 13, 2004, Chubb issued checks in the amount of \$3,935.30 and \$26,084.03 to NCMC for reimbursement of defense expenses. True and correct copies of the checks dated September 13, 2004 are attached to the AOE as **Exhibit "S."**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28th day of September 2005, at Irvine, California.

s/Monika L. McCarthy

MONIKA L. McCARTHY